BEFORE THE NATIONAL LABOR RELATIONS BOARD

MILLER & ANDERSON, INC.,	:	
and	:	
TRADESMEN INTERNATIONAL, INC.,	:	
Respondents,	:	05-RC-079249
and	:	
SHEET METAL WORKERS, INT'L ASSN., LOCAL UNION NO. 19,	:	
Petitioner.	:	

Petitioner's Opposition to Respondent Tradesmen International's Motion to Dismiss Petition and Request for Review as Moot

Respondent Tradesmen International has filed a Motion to Dismiss the Petition and Request for Review filed by Sheet Metal Workers International Association, Local Union No. 19. Tradesmen, with the support of its co-respondent, Miller & Anderson, suggests that the matter pending for resolution by the Board is now moot. In support of this position, Tradesmen offers a single page affidavit from one of its managers claiming it no longer performs work in Franklin County, Pennsylvania.

The primary issue now before the Board arrived as a Request for Review of an administrative dismissal declining to exercise jurisdiction in the absence of the consent of alleged joint employers. Consequently, no factual record exists regarding whether work regularly was or will be performed by the employer(s) in Franklin County. The Respondents in their current motion, state that "circumstances have changed," when in fact, no circumstances have been established in the first

place. By its motion, the Employers essentially ask the Board to allow them to create a record by unchallenged affidavit.

How often the Employer performed the work at issue within the geographic area of this petition, and its likelihood to continue that work in the future, are factual issues the Petitioner would have vigorously challenged if the Region had not dismissed this petition on the grounds that a "multiemployer" unit was sought. These are questions Local 19 will certainly raise in response to the Employer's new claims should the Board reverse the Regional Director's decision to dismiss for lack of consent.

Indeed, arguments about the availability of work were the core dispute at hearing for each and every case directly relied upon by the Employer in the instant motion. In *Davey McKee Corporation*, 308 NLRB 839 (1992), *M.B. Kahn Construction Co.*, 210 NLRB 1050 (1974), *General Motors Corporation*, 88 NLRB 119 (1950), and *Sparton Teleoptic Co.*, 81 NLRB 1228 (1949), the Board's decisions that there were no longer units to represent were made *after* the creation of factual records at hearing wherein the petitioners challenged the employers' assertions and were thereafter permitted the opportunity to submit briefs in support of their arguments that the employer had worked in the area regularly and would continue to do so.

Fish Engineering & Construction Partners, Ltd., 308 NLRB 836 (1992), issued on the same day as its companion case, *Davey McKee Corporation*, *supra*, and cited by the Employer in a footnote, is the perfect demonstration as to why the Employer's motion, founded solely upon affidavits, is an insufficient record upon which to declare this matter moot. In *Fish Engineering*, the Board analyzed a factual hearing record about ongoing and upcoming projects and reached the opposite conclusion as it did in *Davey McKee*, and reversed the Administrative Law Judge's decision

to find that there *was* a sufficient expectation of ongoing work to justify the election. Here, Sheet Metal Workers Local 19 deserves the opportunity to challenge Miller & Anderson and Tradesmen International on the very same grounds at hearing, once the Board rules upon the issue upon which it has granted review.

Finally, the most recent case cited in the Employers' motion, *In re Corrections Corp. of America*, 338 NLRB 452 (2002), is readily distinguishable. As an initial matter, that case was also a post-hearing appeal, one in which challenges and objections were made to the tally of votes, but before the objections could be resolved, the work disappeared. The facts of that matter, and the tack taken by the Board in response to them, are distinguishable because the dispute in *Corrections Corp.* did not arise in a construction context, but in a prison facility where government action led to the termination of a private contractor in favor of performance of the work by public employees.

The distinguishing itinerant and short-term nature of construction is acknowledged in the statutory history and structure of the Act. The limited time frames of work and the project-to-project nature of the employment relationship are recognized in the statute itself in Section 8(f) and in the caselaw, particularly in the development of an industry-unique eligibility formula. This context is important for two reasons.

First, construction projects, unlike factories, warehouses, or prisons, exist for short periods of time in various locations. Consequently, construction employers will often argue in R-Cases, as they did in each of the cases discussed above, that a project is "one-time only" or that they have no expectation of continuing to operate in a particular territory in the future. Not surprisingly, the petitioning union often disagrees with these self-serving representations, arguing, for example, that the employer's past consistent work in the area, unfinished work on an ongoing project, or bids on

future projects undermined the employer's contentions. *See e.g., Fish Engineering*, 308 NLRB at 836. When these disputes arise, they are resolved, without exception, by an R-Case hearing, as they were in each of the cases cited by the employer and discussed above. A fixed location workplace, like a prison, may cease to operate in an area, but it will do so for different and more easily confirmable reasons. Thus, it is understandable that the Board did not appear to concern itself with having a factual hearing on the new information in *Corrections Corp.,* because unlike in a construction context, there could be no factual dispute about past or future employer behavior that would have influenced the definition of the unit or undermined the assertion that the work had disappeared.

Second, the mooting of a petition as sought by the Employers here would effectively negate the ability of a construction trade union to ever appeal an administrative dismissal. The speed with which construction circumstances change would ensure that an appeal could never be decided swiftly enough to escape some claim of mootness on the unchallenged employer representation that a particular project is at an end.

Consequently, Respondent's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing have been served by electronic mail on the following this 23th day of July, 2015:

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